Supreme Court of the United States

OCTOBER TERM, 1901.

No. 165.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,

v.

JENNIE M. METTLER, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

This cause is presented in two phases: (1) Motion to dismiss the writ of error for want of jurisdiction, and (2) the questions on the merits, and they will be considered in this order.

First.

On March 30, 1901, defendant in error submitted a motion to dismiss the writ of error for want of jurisdiction in this court, but it was passed for consideration when the case should be submitted on its merits. On December 2, 1897, defendant in error, a *feme sole*, filed suit against the plaintiff in error in the district court of Dallas county, Texas, on three policies of life insurance, each for the sum of five thousand dollars, on the life of her brother, William A. Hunter. The action, begun by petition under the rules of

pleading in Texas, was in the ordinary form of life-insurance policies, and concluded with a prayer—

"That upon a hearing hereof plaintiff have judgment against the defendant for said principal sum of fifteen thousand dollars, together with interest and damages provided by law, for costs of suit, and for such other and further relief, general and special, as to the court may seem fit and proper."

On January 4, 1898, plaintiff in error filed petition for the removal of the cause to the circuit court of the United States for the northern district of Texas, the petition being as follows, to wit:

"Your petitioner, The Fidelity Mutual Life Association, respectfully shows to this honorable court that it is the defendant in this suit, which was filed herein December 2nd, 1897, and which is of a civil nature, and that the matter and amount in dispute in this cause exceeds, exclusive of interests and costs, the sum or value of $2,000.00.

"That the controversy herein is wholly between citizens of different States, and which can be fully determined as between them; that the plaintiff, Jennie M. Mettler, was at the time of the commencement of this suit, and still is, a resident and citizen of the State of Texas and of Reeves county, in said State, and that your petitioner, The Fidelity Mutual Life Association, was at the time of the commencement of this suit, and still is, a resident of and citizen of Pennsylvania, and of no other State, and a non-resident of the State of Texas, and that it is a corporation created and incorporated under and by virtue of the laws of the State of Pennsylvania, and has its domicile, place of business, home office, and citizenship and residence in the city of Philadelphia, in said State of Pennsylvania, and that your petitioner desires here now, before it is required by the laws of this State or rules of this court to plead or answer in this suit in this court and before the trial thereof, to remove this suit into the next circuit court of the United States to be held in the northern district of Texas; that it is not so required to appear or answer before January 4th, 1898.

"And your petitioner offers herewith good and sufficient

sureties for its entering into the circuit court of the United States for the northern district of Texas, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if it shall hold that this suit was wrongfully or improperly removed thereto, and for entering special bail in said suit if special bail was originally requisite therein.

"And your petitioner therefore prays that the said sureties and bond may be accepted; that this said suit may be removed into the next circuit court of the United States to be held in the northern district of Texas, pursuant to the statutes of the United States made and provided, and that no further proceedings may be had herein in this court; and it will ever pray."

Acting upon this petition, the cause was removed by order of the district judge January 4, 1898, and it will be observed from the foregoing petition that the removal was sought and had solely on the ground of diversity of citizenship.

After removal of the cause to the circuit court of the United States, to wit, on November 11, 1899, defendant in error filed her first amended original petition, in which, among other things, it was for the first time expressly alleged:

"Plaintiff shows that the defendant is, by virtue of the statute of Texas of 1895, in reference to providing against life and health insurance companies and associations refusing and failing to pay their losses within the time provided for in their policies, liable to plaintiff herein, and promised to pay her, in addition to the amount called for by said policies, twelve per cent. damages on the amount of said claim, together with all reasonable attorneys' fees for the prosecution and collection of such loss, which attorneys' fees plaintiff alleges to be fifteen per cent. of the principal, interest, and damages due plaintiff by defendant on account of plaintiff having to prosecute this suit. Plaintiff shows that the statute imposing damages and attorneys' fees upon defendant for failing to pay the loss within the times specified in the policies was first enacted by the legislature of Texas

on May 3rd, 1874; it was carried into the Revised Statutes of 1879, and again into the Revised Statutes of 1895, substantially in the same form, which statute the supreme court of Texas has often and uniformly held to be void. Plaintiff shows that the policies sued on were issued October 31st, 1896, after said statute of 1895 went into effect; that the defendant, as a foreign corporation, was allowed by the State of Texas to issue policies upon the life of William A. Hunter, a Texas citizen, by comity, and had the right, as it did, to prescribe said terms as a condition precedent to defendant's issuing said policies. Plaintiff shows that the defendant agreed and was when it issued said policies obligated to comply with the law of the State of Texas to procure its permit to transact and engage in business in Texas, whereby it became bound and is liable to plaintiff for said twelve per cent. damages and reasonable attorneys' fees."

The prayer in this pleading of defendant in error, her first amended original petition, is:

"Wherefore plaintiff prays that on a hearing hereof, the defendant having already been cited, that she have judgment for $15,000, the face of said policies, with legal interest thereon, together with twelve per cent. damages thereon, and reasonable attorneys' fees, namely, ten per cent. of the amount recovered, for all costs of suit and such other and further relief as to the court may seem fit and proper."

It will be noted that in the original petition, prior to removal, the prayer is for the "principal sum of fifteen thousand dollars, together with interest and damages provided by law, for costs of suit," while after removal, in the first amended original petition, it is for "fifteen thousand dollars, the face of said policies, with legal interest thereon, together with 12 per cent. damages thereon, and reasonable attorneys' fees, namely, ten per cent. of the amount recovered, for all costs of suit."

The statute of the State of Texas under which damages and attorneys' fees are claimed, and which plaintiff in error

insists is in conflict with the Constitution of the United States, is article 3071 of the Revised Statutes, as follows:

"In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of such loss."

The plaintiff in error after removal specially excepted to that part of the first amended original petition of defendant in error heretofore set out which claims attorneys' fees and statutory damages, upon the ground that the same are asserted and claimed under a statute of the State of Texas which is in violation of section 1, article 14, of the Constitution of the United States, and on the trial said exceptions were overruled by the circuit court.

Upon this record it is submitted that this court is without jurisdiction. By the fifth section of the act of 1891 creating the circuit courts of appeals, writs of error may be prosecuted to this court from the circuit courts "in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States," and by the sixth section of that act it is provided that "the judgments or decrees of the circuit courts of appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States." Undoubtedly in this case jurisdiction of the circuit court depended entirely upon the opposite parties being citizens of different States, for that was the only ground of removal, and by all the authorities nothing subsequent to removal can add to or take from the jurisdictional facts. As to jurisdiction, neither the original petition nor the petition for

removal, by which alone the question is to be tested, contain any averments except as to diversity of citizenship. The jurisdiction of the United States circuit court having therefore been acquired solely on the ground of diversity of citizenship, the circuit court of appeals for the fifth circuit had final jurisdiction of the cause. It is true that subsequent to removal it was claimed by plaintiff in error that the statute of Texas was in conflict with the Constitution, but this should not be held to add to the jurisdictional facts, for by no other construction can the fifth and sixth sections of the act of 1891 be fairly and justly harmonized. In analogous cases it has been held that when the Federal question arose after the filing of the petition this court was without jurisdiction.

Company *v.* Turck, 150 U. S., 138.
Borgmeyer *v.* Idler, 159 U. S., 408.
Ex parte Jones, 164 U. S., 691.

In removal cases especially this rule should prevail, because, as we have already said, jurisdiction cannot be made to appear or be destroyed after removal proceedings are filed. The plaintiff in error deliberately elected to stand on diversity of citizenship as to jurisdiction and did not claim in its petition for removal that the statute of Texas was in conflict with the Constitution of the United States. This is particularly significant when the original petition claimed the statutory damages under the terms "damages provided by law," in the prayer and thus, at the outset, presented the question. Applying the principles announced by this court in the most recent case, when the jurisdictional facts should have been presented the pleadings stated "no other ground of Federal jurisdiction" except diversity of citizenship, and as "nothing more appeared bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the circuit court."

Loeb *v.* Township Trustees, 179 U. S., 472, 477.

It ought not to be held that under the fifth section of the act of 1891 this court has jurisdiction if it is "claimed" *at any time* that a State law is repugnant to the Federal Constitution. In the case at bar the claim should have been made in the petition for removal. Such construction, just and fair in itself, will harmonize sections 5 and 6 of the act of 1891 and effectuate their policy.

Second.

The only other question so far presented (January 27, 1902) in any brief of the plaintiff in error is that article 3071 of the Revised Statutes of Texas is repugnant to the Constitution of the United States because it denies to plaintiff in error the equal protection of the laws.

The statute of Texas which is attacked provides in effect that where a loss occurs and the life or health insurance company liable fails to pay the same within the time specified by the policy after demand made, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 12 per cent. damages on the amount of such loss, together with all reasonable attorneys' fees for the collection thereof. As we gather it, the argument seems to be that the legislature of Texas is without authority to impose payment of damages and attorneys' fees upon life and health insurance companies on losses when payment of like damages and fees is not imposed upon persons and corporations generally on their debts or upon mutual benefit and mutual relief associations and accident insurance companies for their losses.

The precise question thus raised has been settled against the contention of plaintiff in error quite recently in this court, in the case of *United States Life Insurance Company v. J. E. Ross*, administrator. This action was originally instituted in the district court of Limestone county, Texas, was removed to the United States circuit court for the

northern district of Texas, at Waco, where final judgment was entered at the November term, 1899, and this judgment was affirmed by the circuit court of appeals at New Orleans, June 1, 1900. On July 14, 1900, a petition for a writ of certiorari was filed in this court, in which, among other things, the following is set forth:

"6. Upon conclusion of the testimony the judge presiding gave a peremptory instruction to the jury to return a verdict for the respondent for the full sum of the policy, to wit: $10,000, together with legal interest thereon from the first of March, 1895, as well as twelve per cent. statutory damages under the statutes of Texas and reasonable attorneys' fees, which were conceded to be ten per cent. upon the amount of recovery. Petitioner presented counter-instructions submitting various issues arising upon the testimony, all of which counter-instructions were refused, and thereupon petitioner excepted to the charge of the court and to the refusal of instructions requested, and duly saved the same by bill. The jury found in accordance with the instructions of the court for respondent for the full amount of the policy as well as interest, statutory penalty and reasonable attorneys' fees, their finding being in the aggregate the sum of fifteen thousand five hundred and twenty-five $\frac{79}{100}$ dollars. Respondent moved for a new trial upon the grounds that it was error in the court to overrule the motion to suppress the deposition of Harris as well as error in the court in awarding to respondent a peremptory instruction in view of the conflicting evidence in the case, the whole case resting substantially upon the testimony of J. W. Harris, especially that feature relating to delivery of the policy *vel non*, in which testimony Harris had plainly contradicted himself. Defendant also based its motion for a new trial upon the further ground that by reason of said peremptory instructions and the conflict of the evidence it had been deprived of a constitutional right of trial by jury, and further because the statutes of the State of Texas authorizing the imposition of a statutory penalty of twelve per cent. upon a life insurance company, as well as reasonable attorneys' fees, was an embargo upon justice, discriminatory, denied to life insurance companies the equal protection of the laws, and de-

prived such companies of their property without due process of law, was arbitrary and unreasonable, in that no other person or corporation was subject under the laws of Texas to such pains and penalties for the failure to pay a debt, and was therefore violative of the Constitution of the United States. The court overruled the motion for new trial, and thereupon petitioner prosecuted error in the United States circuit court of appeals for the fifth circuit, and which court on, to wit: the 4th day of June, 1900, did affirm the judgment of the court below, and almost immediately thereafter did adjourn for the term. Petitioner has attempted to file in said circuit court of appeals its motion for rehearing, but under the rules of said court it is necessary after the final adjournment for the term and before filing a motion for rehearing to obtain the consent and order of some judge before the said motion could be filed. Petitioner has applied to the Honorable A. P. McCormick, one of the judges of the circuit court of appeals, for permission to file its motion for rehearing within twenty days as prescribed by the rules of said court, but such permission has been refused; wherefore petitioner says it is wholly remediless except by the interposition of this honorable court."

* * * * * * *

"*Fourth.* The validity of the Texas statute imposing a penalty upon life insurance companies alone of twelve per cent. damages and reasonable attorneys' fees besides interest, no such imposition being placed by the laws of said State upon any other person or corporation, has never been adjudicated by this court and presents a question entitled to the consideration of the court. This statute has been sustained by the highest court in the State of Texas and it has also been sustained by the United States circuit court of appeals for the fifth circuit, in the case of The Merchants' Life Association of America *v.* Yoakum, decided by said last-named court in May, 1899. No case has been found, however, where this question has been ruled upon by this honorable court."

The question was discussed in briefs by counsel for both parties, and on October 15, 1900, the petition was denied. Undoubtedly while a writ of error will not lie to both the

circuit court of appeals and the Supreme Court in the same case (Loeb *v.* Township Trustees, 179 U. S., 472), yet it was competent for this court to grant the petition for *certiorari* and take cognizance of the case (Robinson *v.* Caldwell, 165 U. S., 359, 362; Clews *v.* Jamieson, 182 U. S., 461), and its refusal was tantamount to a rejection of the contention.

So, too, the question is settled against plaintiff in error by the decisions of the circuit court of appeals for the fifth circuit, by those of the court of civil appeals of Texas and by those of the supreme court of Texas.

Ins. Ass'n *v.* Yoakum, 98 Fed. Rep., 251.
Ins. Co. *v.* Ross, 102 Fed. Rep., 722.
Casualty Co. *v.* Dorough, 107 Fed. Rep., 389.
Ins. Co. *v.* Walden, 26 S. W. Rep., 1012.
Ins. Co. *v.* Orloff, 61 S. W. Rep., 336.
Ins. Co. *v.* Chowning, 86 Texas, 654.
Casualty Co. *v.* Allibone, 90 Texas, 660.

In view of the decision in the *Ross* case, where the identical question was squarely presented and necessarily determined, it seems useless to enter upon an extended presentation of it here. It appears sufficient, even in abundant caution, to state briefly the two general grounds upon which this and kindred statutes have been upheld, leaving to oral argument a more comprehensive statement if such should be desired:

1. The statute is a condition upon which plaintiff in error is authorized to do business in Texas, and the fact of its engaging in business constituted an acceptance of the condition.

The first general insurance statute of Texas was passed May 2, 1874. It contained in one section a provision for the payment of 12 per cent. damages and reasonable attorneys' fees, and a provision to the effect that if an insurance com-

pany so liable should fail to pay off and satisfy any execution that might lawfully issue on a final judgment within thirty days after information thereof, the certificate issued to such company should immediately become null and void. This latter clearly shows that the provision as to damages was a condition to the permit to do business in the State and is as follows:

"ART. 7116*o*. The several foreign life insurance companies, and those incorporated out of this State, in all cases where a loss occurs, and where they refuse to pay the same within the time specified in the policy, shall be liable to pay the holder of said policy, in addition to said loss, not more than twelve per cent. on the liability of said company for said loss; also all reasonable attorneys' fees for the prosecution of the case against said company; and should any such company fail to pay off and satisfy any execution that may lawfully issue on any final judgment against said company within thirty days after notification of the issuance thereof, then and at that event, the certificate issued to said company shall immediately become null and void, and said insurance company shall be prohibited from transacting any business in this State until said execution shall have been fully satisfied and discharged" (2 vol. Paschal's Digest Laws, p. 1457*d*).

In the revision of the laws of Texas, without changing their meaning and effect, these provisions were embodied in two articles, and now appear in the Revised Statutes as follows:

"ART. 3071. In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of loss, 12 per cent. damages on the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of such loss.

"ART. 3072. Should any life or health insurance company fail to pay off and satisfy any execution that may lawfully issue on any final judgment against said company within thirty

days after the officer holding such execution has demanded payment thereof from any officer, agent or attorney of such company in this State or out of it, such officer shall immediately certify such demand and failure to the commissioner of insurance, and thereupon the commissioner shall forthwith declare null and void the certificate of authority issued by him to such company, and such company shall be prohibited from transacting any business in this State until said execution shall be fully satisfied and discharged, and until such commissioner shall renew his certificate of authority to such company."

In addition to these articles, the purpose to make the liability for damages and attorneys' fees a condition upon the right to do business in Texas is emphasized by subdivision 15, article 3050, of the Revised Statutes of Texas, defining the duties of the commissioner of insurance, as follows:

"He shall suspend the entire business of any company of this State, and the business within this State of any other company, during its non-compliance with *any* provision of the law relative to insurance, or whenever its assets appear to him insufficient to justify its continuance in business, by suspending or revoking the certificate granted by him, and he shall give notice thereof to the insurance commissioner or other similar officer of every State, and shall also publish notice thereof."

Ins. Co. *v.* Walden, 26 S. W. Rep., 1012.
Ins. Co. *v.* Allibone, 15 (Texas) Ct. Civ. App., 178.
Ins. Co. *v.* Orloff, 61 S. W. Rep., 336.
Ins. Co. *v.* Allibone, 90 Texas, 660.
Ins. Co. *v.* Herriott, 91 Fed. Rep., 711.
Ins. Co. *v.* Yoakum, 98 Fed. Rep., 251.
Fire Ass'n. *v.* New York, 119 U. S., 110.
Ins. Co. *v.* New York, 134 U. S., 594, 601, 602.
Ins. Co. *v.* Daggs, 172 U. S., 557, 566, 567.
Tullis *v.* R. R. Co., 175 U. S., 348, 352.
Oil Co. *v.* Texas, 177 U. S., 28.
Petit *v.* Minnesota, 177 U. S., 164, 168.
Ins. Co. *v.* Cravens, 178 U. S., 389.
Ins. Co. *v.* Warren, 181 U. S., 73, 76.

An analysis of the Texas cases above cited will show that it is held by the courts of that State that the statute giving damages and attorneys' fees is a condition upon which the insurance companies may do business in Texas, and this interpretation, it has been held, will be followed by this court. On this point the case of Ins. Co. *v.* Daggs, *supra*, is pertinent. In this case it was held by the supreme court of Missouri (136 Mo., 282) that the valued policy law of that State, to the effect that in all suits on policies of insurance against loss or damage by fire the defendant should not be permitted to deny that the property insured thereby was worth the full amount issued thereon, was constitutional, and in affirming the judgment this court said (172 U. S., 566, 567):

"The statute is not subject to the condemnation that it regulates contracts made or rights acquired prior to its enactment; and we may repeat the language of Mr. Justice Field, in Missouri Railway Co. *v.* Mackey, *supra*, that 'it cannot be successfully contended that the State may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every State.'

"That which a State may do with the corporations of its own creation it may do with foreign corporations admitted into the State. This seems to be denied, if not generally, at least as to plaintiff in error. The denial is extreme and cannot be maintained. The power of a State to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in Hooper *v.* California, 155 U. S. 648, and need not be repeated.

"It is urged that the statute is not made a condition upon foreign corporations, but this view is not open to our acceptance. The supreme court of Missouri, exercising its function of interpretation, decides that it is. But we do not care to enter fully into the subject of conditions on corporations, foreign or domestic. The statute is sustained on the grounds that we have given."

2. The classification of life and health insurance companies made by the statute is a valid exercise of legislative power.

Ins. Co. *v.* Walden, 26 S. W. Rep., 1012.
Ins. Co. *v.* Orloff, 61 S. W. Rep., 336.
Ins. Co. *v.* Yoakum, 98 Fed. Rep., 251.
Ins. Co. *v.* Ross, 104 Fed. Rep., 722.
Casualty Co. *v.* Dorough, 107 Fed. Rep., 389.
Ins. Co. *v.* Chowning, 86 Texas, 654.
Casualty Co. *v.* Allibone, 90 Texas, 660.
R. R. Co. *v.* Mackey, 127 U. S., 205.
Ins. Co. *v.* New York, 134 U. S., 594.
Giozza *v.* Tiernan, 148 U. S., 657, 662.
Magoun *v.* Savings Bank, 170 U. S., 283.
Ins. Co. *v.* Daggs, 172 U. S., 557.
R. R. Co. *v.* Paul, 173 U. S., 404.
R. R. Co. *v.* Matthews, 174 U. S., 96.
Sugar Co. *v.* Louisiana, 179 U. S., 89.
Williams *v.* Fears, 179 U. S., 270, 275, 276.
Ins. Co. *v.* Warren, 181 U. S., 73, 76, 77.

So far as we are advised, the case of Insurance Co. *v.* Warren, *supra*, is the latest one in which these questions are discussed by this court, and it is there held not only that a kindred statute to the one under consideration was a condition upon the right to do business in the State, "the same as if the law was copied into and made a part of the policy" (p. 75), but that the classification of life insurance companies by the legislature was not a violation of the Federal Constitution by the State in its power over corporations. In this case the supreme court of Ohio (59 O. State, 45) had affirmed the constitutionality of a section of the Revised Statutes of Ohio which provided, in effect, that no answer to any interrogatory made by the applicant for a policy shall bar the right to recover or be used in evidence on a trial unless it

be clearly proved that such answer is wilfully false and was fraudulently made; that it is material and induced the company to issue the policy, and that but for such fraud the policy would not have been issued, and, moreover, that the agent of the company had no knowledge of the falsity or fraud of such answer. This, as will be seen, is a statute only applicable to life insurance companies, thereby putting them in a separate and distinct class; and this court, in affirming the judgment of the supreme court of Ohio, said pp. 75, 76, 77):

"In the present case the supreme court of Ohio sustained the constitutionality of section 3625 of the Revised Statutes, which was in force at the time this policy was issued, upon the ground that the State had a right 'to prescribe the terms and conditions upon which it grants such franchise, and the insurance company, having accepted the franchise with its terms and conditions, is bound thereby and must accept the burdens with the benefits.' The legal effect was held to be the same 'as if the section was copied into and made a part of the policy.' And it was said that the statute had also been held constitutional in National Life Insurance Co. *v.* Brobst, 56 Ohio St., 728, where no opinion seems to have been delivered.

"The section in question applies to all life insurance companies doing business in the State of Ohio, and the State can certainly do with foreign corporations what it may do with corporations of its own creation.

"In Orient Insurance Co. *v.* Daggs, 172 U. S., 557, we held that provisions in the Revised Statutes of Missouri, that 'in all suits upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount inserted therein on said property,' etc., and 'that no condition of any policy of insurance contrary to the provisions of this article shall be legal or valid' were not in conflict with the Constitution of the United States. And this was affirmed in New York Life Insurance Co. *v.* Cravens, 178 U. S., 389.

"In Waters-Pierce Oil Co. *v.* Texas, 177 U. S., 28, where a

statute of Texas was assailed on the ground that it took away the liberty of contract, Mr. Justice McKenna, delivering the opinion of the court, said: 'The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the State over them. What those rights are and what that power is, has often been declared by this court. A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. The purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader meaning to foreign corporations.' And as the State court had held that the statute was a condition imposed on the oil company on doing business within the State, it was said of it that 'whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it.' And see Tullis *v.* Railroad Company, 175 U. S. 348; Equitable &c. Assurance Society *v.* Clements, 140 U. S. 226.

"It was for the legislature of Ohio to define the public policy of that State in respect of life insurance, and to impose such conditions on the transaction of business by life insurance companies within the State as were deemed best. We do not perceive any arbitrary classification or unlawful discrimination in this legislation, but, at all events we cannot say that the Federal Constitution has been violated in the exercise in this regard by the State of its undoubted power over corporations."

W. H. Clark,

C. A. Culberson,

Counsel for Defendant in Error.

No. 165

Add'l Br. of Clark & Culberson

for D. C.

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JAMES H. MCKENNEY
Clerk

Supreme Court of the United States.

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v.

JENNIE M. METTLER, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

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Up to January 27, 1902, when we were compelled to send the manuscript of our brief to the printer, no question had been discussed in this cause by any counsel for plaintiff in error except that of the jurisdiction and the constitutionality of the Texas statute, and consequently our brief is also confined to those two questions. On January 28th, however, counsel for plaintiff in error filed a brief in which three other questions are presented, and this additional brief, necessarily prepared in haste, is filed in answer, being confined to the three propositions referred to, and which will be considered here in the order presented in the brief for plaintiff in error.

Before proceeding with these matters the attention of the

court is called to the admission made in open court by plaintiff in error (Rec., p. 36), as follows:

"Defendant admitted that all matters of proof relating to the death of the insured—all formal proofs—are sufficient and that the only question to be tried and involved is the question of whether or not W. A. Hunter is dead as claimed in plaintiff's petition and whether he died in the manner and form as alleged therein."

First.

Under the circumstances, the court did not err in admitting the testimony of a repute in the family of Hunter concerning his death. The only testimony on this subject is that of the defendant in error (Rec., pp. 48, 49) and the other surviving members of her family (Rec., pp. 56, 57), to the effect that the general repute in the family was that Hunter was dead, having been drowned in the Pecos river, in Texas.

It will be observed by the court that inasmuch as each and every member of the family testified to the same thing on this subject—the defendant in error in open court and the other members of the family by deposition—there is, strictly speaking, no question of hearsay involved, because the jury was not called upon finally to make up their verdict upon what one member of the family testified as to the other. Whatever objection might have been urged to the testimony of either of the witnesses singly, the fact that what such witness might have said with reference to other members of the family may have been hearsay was obviated and removed by introducing the testimony of them all as was done.

The trial court (Rec., p. 48) in admitting this testimony limited and controlled it as follows:

"I think the question is one of weight to be given the evidence. It is a question for the jury to say whether family belief tends to prove his death."

Taking all the circumstances into consideration in connection with this instruction of the court to the jury, the testimony was not objectionable.

1 Taylor, Ev., sec. 572.
2 Rice, Ev., pp. 1223, 1224.
1 Greenleaf, Ev. (12 ed.), secs. 103, 104.
Jackson *v.* Bonham, 15 Johnson, 226.
Doe *v.* Griffin, 15 East., 293.
Webb *v.* Richardson, 42 Vt., 465.
Cochrane *v.* Libbey, 18 Me., 39.
Clark *v.* Owens, 18 N. Y., 434.
Jackson *v.* Etz, 5 Cow., 314.
Morris *v.* Edwards, 90 N. C., 382.
Ewing's Heirs *v.* Savory, 3 Bibb, 235.
Mason *v.* Fuller, 45 Ver., 29.
Ringhouse *v.* Keener, 49 Ill., 470.

Second.

For three reasons the contention of plaintiff in error, beginning at page 13 of the brief, on the subject of warranty as to the business or calling of Hunter at the time of the issuance of the policy, is not well founded.

1. The entire charge of the court is not in the record, nor is there anything in the record to show that the subject of warranty was not covered by the general charge. In the absence of such showing this court will presume, if the evidence demanded a charge on this question, it was given in the general charge.

Reagan *v.* Aiken, 138 U. S., 109, 113, 114.

2. There was not sufficient evidence to support a charge to the jury on the subject of warranty as to Hunter's business or calling. In his application for insurance, dated October 28, 1896, Hunter stated (Rec., p. 42) that "my present

occupation is real estate and farming—prior to that book-keeping." This answer is abundantly supported by the testimony, for it is shown that he was in the real-estate and farming business; that he occupied a section of land in Loving county, Texas, for three years (Rec., p. 46); that he was in the real-estate and farming business (Rec., p. 49); that he was engaged in farming, "planted everything he could think of to see if it would grow, planted corn, grain, potatoes, beans, lettuce, radishes, watermelons" (Rec., p. 51). It was also shown by the testimony (Rec., p. 50) that Hunter resided at Mentone, Loving county, Texas, "where he engaged in the real-estate and farming business and looked after their irrigation business in Loving county."

As justifying a charge on this subject, plaintiff in error points to the forfeiture of claims of Hunter as to public domain in Texas (Rec., pp. 68, 69, 70), and to the testimony of a photographer (Rec., p. 82). As to the forfeiture, it is sufficient, it seems to us, to say that it is not shown that he did not occupy the land notwithstanding such forfeiture, and especially (Rec., p. 70) the so-called forfeitures were not entered until February 8, 1897, after the death of Hunter.

The testimony of the photographer referred to is as follows:

"Jno. Schwarts, being duly sworn in behalf of defendant, testified:

"I reside at Fort Worth, Texas, and have about six or seven years; am acquainted with Mrs. Mettler, the plaintiff; have known her about 15 years. I know W. A. Hunter; have known him about the same length of time; I knew him at Fort Worth, Texas; was once in my employment; assisted in waiting on customers; I think it was in the year 1896; he came to Fort Worth the first part of the summer and stayed there during the summer; do not know what month he left; think he was there about three months; I was well acquainted with Hunter; he boarded at three or four different places; roomed at the gallery, my place of business; I last saw him late in the fall, either November

or December; he was there in Fort Worth; came to Dallas after he left Fort Worth and was there a few days.

"Witness was asked whether Hunter had a valise of any character; if so, describe it: He had a small hand grip about like that, as well as I remember (pointing to a small hand grip on the table); it was a dark tan color. Think he left my employ in July or August; he came to Dallas after he left Fort Worth; he was here several months before he went West, I suppose.

"On cross-examination witness testified:

"I slept at the gallery part of the time; have known Hunter about fifteen years; first met him at Fort Worth; *was in my employ part of the time, two or three months in the summer;* he was not getting much salary; he was unemployed and making his expenses; I think, as well as I remember, he had a grip something like that pointed out. I don't remember his having a large grip; one of those cloth grips that slip up and down--telescope. I do not undertake to say he did not have one; I don't remember whether he had one or not."

Rec., p. 82.

With reference to this testimony it seems enough for us to point out that it is not only too vague and indefinite as to the time when Hunter was at the photograph gallery in Fort Worth, the witness not being able even to fix the year positively to support a charge as to breach of warranty, but that admitting that the time covered by it was that covering also the date of the application for insurance, the temporary work he did in the photograph gallery would not justify the submission to the jury of the question of breach of warranty.

In this connection we call the attention of the court to the fact (Rec., pp. 106, 107) that the application for insurance was made to the State agent, who had known Hunter since 1888, and esteemed him "a man of good character." In the conversation between Hunter and the State agent, leading up to the formal application for insurance, Hunter stated with considerable detail his connection with farming, real estate,

and irrigation matters in western Texas, which, as we have before pointed out, is abundantly supported by the testimony.

3. Taken altogether, the policy and the answers in the application did not constitute a warranty as to the business or calling of Hunter.

Ins. Co. *v.* Munger, 92 Tex., 297, 304.
Moulor *v.* Ins. Co., 111 U. S., 335.

Third.

The contention with reference to charges given and refused, beginning at page 18 of the brief of plaintiff in error, is not, in our judgment, well founded.

The substance of the charge refused, as shown at page 20 of the brief of plaintiff in error, was given in the general charge, as shown at the same page, in a manner much more pertinent to the testimony.

The entire charge of the court not being in the record, the court will assume, if they be applicable, that the charges asked, as shown at pages 21 and 22 of the brief of plaintiff in error, were given in the general charge.

In the charges given as well as those refused the trial court was governed and controlled by the principles announced in the well-considered cases cited below.

Davie *v.* Briggs, 97 U. S., 628.
Insurance Co. *v.* Stevens, 71 Fed. Rep., 258.
Sensendeifer *v.* Ins. Co., 19 Fed. Rep., 68.

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Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 428.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,

vs.

JENNIE M. METTLER, DEFENDANT IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS, AT DALLAS.

ADDITIONAL ARGUMENT FOR DEFENDANT IN ERROR.

The brief for plaintiff in error in opposition to the motion of defendant in error to dismiss the writ of error or affirm the judgment incorrectly states, on page 6 of its brief, the 12 per centum damages allowed by the statute as being $5,175. The correct amount is $1,800 (Trans., p. 19).

The brief also ignores the fact that when the circuit court acquired jurisdiction, the statute allowing the 12 per centum

damages and reasonable attorneys' fees not only did not appear, but was not involved in the case. The petition of plaintiff in the State court and the defendant's petition for removal show that the alleged Federal question was not involved, and therefore it could not be raised by the defendant when the jurisdiction of the circuit court was acquired.

As said in Loeb *vs.* Columbia Township Trustees, 179 U. S., 477:

"The petition shows that the parties are citizens of different States. It states no other ground of Federal jurisdiction. If nothing more appeared bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the circuit court."

Such is the case at bar.

If there was any doubt upon this question the Loeb case would settle it.

In the Loeb case the act of Ohio was pleaded to show the authority for the issuance of the bonds sued on, and the validity of the act was involved, as appeared from the petition. The decision does not overrule or modify the cases cited in the brief of defendant in error, but, as shown by the above-quoted language, approves their well-settled rule. Plaintiff in error misunderstands the Loeb case, notwithstanding its language is very plain.

Respectfully submitted.

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For Defendant in Error.